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No. 08-849

Supreme Court, U.S.
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In the Supreme Court of the United States

RAYMOND A. KIGHT, ET AL.,
Petitioners,

v.

SHERRI A. TURNER,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF NORTH CAROLINA, ALASKA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, KENTUCKY, MASSACHUSETTS, MISSISSIPPI, NEVADA, NORTH DAKOTA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

When a federal district court dismisses state law claims under 28 U.S.C. § 1367(c) and the state limitations period has expired, is the time period under 28 U.S.C. § 1367(d) for re-filing such claims in state court limited to 30 days?

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INTEREST OF AMICI[1]

The tolling provision of 28 U.S.C. § 1367(d) directly impacts States and state court systems. The statute mandates that state courts hear and adjudicate state law claims which the States would otherwise reject as stale under the state limitations period. The statute therefore raises significant federalism concerns and should be construed so as to minimize the impact on the state court systems.

State courts face substantial dockets. When stale claims are allowed to proceed, the burdens on the state courts are increased substantially. The value and utility of trial testimony greatly diminishes when the memories of witnesses have faded as a result of delay. In such cases, the recollection of the witnesses must be refreshed through documents or deposition transcripts. Other witnesses become unavailable entirely. Simple cases become more complex as documents and records must be introduced to fill-in gaps in the witnesses' narratives – all because the witness is no longer able to recall clearly dates and specific facts. Cases that were once straight-forward become murky with the passage of time. As a result, juries and trial judges must spend more time and resources in attempting to come to a fair result. Moreover, confidence in the judicial system is lost when delay can be used to obtain a strategic advantage. All of these factors further tax already strained state court systems. Accordingly, States have a substantial interest in ensuring that 28

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[1] As required by Supreme Court Rule 37.2(a), counsel of record for all parties received notice of *amici curiae's* intention to file this brief at least ten days prior to the due date for this brief.

U.S.C. § 1367(d) not be construed in a manner that undermines the policy choices made by state legislatures with respect to state limitations periods.

Finally, the States have a substantial interest in the decision below in light of the financial impact on States and their political subdivisions. Here, the court below allowed an action to proceed against eleven state and county law enforcement officers that would otherwise have been barred under the applicable Maryland limitations period. Such a construction of 28 U.S.C. § 1367(d) requires States to expend substantial resources to defend stale claims and subjects the State's political subdivisions to liability – even though the claim would be barred under state law.[2]

REASONS FOR GRANTING THE PETITION

Numerous state courts of last resort have split as to how 28 U.S.C. § 1367(d) should be interpreted. (Pet. at 10-11) Many state courts have found the language of this statute to be ambiguous. As a result, state courts have been forced to guess as to the intent of the United States Congress.

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[2] Maryland law, like that of a substantial number of other States, provides that the State Attorney General shall defend certain claims brought against county sheriffs and deputies. *See* MD. CODE ANN., State Gov't §§ 12-101(a)(6), 12-108(b) (2004 & Supp. 2008).

The issue raised by this petition is important to States, their political subdivisions, and both plaintiffs and defendants in actions brought pursuant to 28 U.S.C. § 1367. This Court should grant certiorari to ensure uniformity on this important and recurring question and to reverse the erroneous ruling of the Maryland Court of Appeals.[3]

I. THE AMBIGUITY CREATED BY CONGRESS PLACES A DIFFICULT BURDEN ON STATES, THEREBY MERITING INTERVENTION BY THIS COURT.

Numerous courts have found the language of 28 U.S.C. § 1367(d) to be ambiguous. *See, e.g., Turner v. Kight,* 957 A.2d 984, 989 (Md. 2008); *Berke v. Buckley Broad. Corp.*, 821 A.2d 118, 123 (N.J. Super. Ct. App. Div.), *certification denied*, 832 A.2d 322 (N.J. 2003); *see also Goodman v. Best Buy, Inc.,* 755 N.W.2d 354, 357 (Minn. Ct. App.) (listing different potential meanings of the phrase "shall be tolled"), *review granted,* 2008 Minn. LEXIS 643 (Minn. 2008). The statute provides:

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[3] This amicus brief focuses exclusively on the first question presented by the petition. The States, however, concur with Maryland that the second issue raised by the petition (i.e., whether a federal action is "pending" within the meaning of 28 U.S.C. § 1367(d) when the plaintiff has appealed a dismissal of the action) has also been problematic for state courts. (Pet. at 13-14)

> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. § 1367(d) (2006). On the one hand, the phrase "shall be tolled while the claim is pending" can be read as meaning that the filing of the federal action suspends the limitations clock. Under such a reading, when the federal action is dismissed and the clock is restarted, the plaintiff would get the benefit of whatever time remained when the limitations period was suspended. On the other hand, the phrase has been construed by the vast majority of courts as meaning that while the federal action is pending, the limitations period will not expire and will not close until 30 days after the federal action is dismissed. *See* Pet. at 10-11 (setting out split of authority). Under such a reading, the plaintiff would need to re-file in state court within 30 days of the dismissal of the federal action (unless the limitations period had not yet expired under state law).

The burden and uncertainty created by Congress' poor draftsmanship falls almost exclusively on state courts and litigants appearing in state courts. Because this federal statute dictates when an action may be re-filed in state court, the issue of whether an action has been re-filed in accordance with the time limits of 28 U.S.C. § 1367(d) only arises in state court. Although

federal courts have cited 28 U.S.C. § 1367(d) in passing when dismissing actions, whether an action has been re-filed within the time period contemplated by 28 U.S.C. § 1367(d) can only be determined after the action has been re-filed. By definition, the re-filing of such claims always occurs in state court. Congress has left in the laps of States a poorly worded statute that directly impacts state law claims brought in state court. State legislatures, however, have no opportunity to correct the uncertainty that Congress has created.

The problem that Congress has caused for state courts can only be resolved by this Court. The circuit courts will never have occasion to pass upon whether an action was timely re-filed in state court under 28 U.S.C. § 1367(d). Accordingly, the substantial split among the state courts of last resort merits intervention by this Court. The state courts have struggled in their efforts to discern congressional intent. A definitive resolution of this important issue is vitally needed.

II. THE DECISION BELOW RAISES AN IMPORTANT ISSUE OF FEDERAL LAW.

The issue presented by the petition is whether 28 U.S.C. § 1367(d) was intended to force state courts to hear stale claims long after the 30-day period set out in the statute has passed. The decision below has broad implications on principles of federalism. Moreover, the proper interpretation of 28 U.S.C. § 1367(d) affects the administration of our Nation's state

courts and directly impacts litigants appearing in those courts.

When Congress commandeers the legislative processes of the States by directly compelling the expenditure of scarce state resources in order to achieve Congress' objectives, principles of federalism are implicated. *See New York v. United States*, 505 U.S. 144, 161 (1992). Under 28 U.S.C. § 1367(d), state court judges are required to hear and adjudicate state law claims that the state legislature has determined to be time barred. When the state court system becomes bogged down with adjudicating such stale claims, no government official stands accountable for the problem. *See New York*, 505 U.S. at 169. Neither state legislatures nor state officials have authority to override the federal tolling period, and Congress is too far removed from the administration of state courts to incur the wrath of citizens when the burden created by Congress strains the state court system and renders it less effective. Accordingly, government accountability is diminished because "elected state officials cannot regulate in accordance with the views of the local electorate." *Id.* To the extent that 28 U.S.C. § 1367(d) is construed as imposing a tolling period greater than is necessary to achieve Congress' objective (i.e., facilitating the prompt transfer of state law claims from federal to state court when all federal law claims are resolved), state sovereignty is jeopardized. *See Raygor v. Regents Univ. of Mich.*, 534 U.S. 533, 546 (2002) ("insofar as statutory intent was ambiguous, we would 'not attribute to Congress an intent to intrude on state governmental functions'") (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991)).

Forcing state courts to hear stale claims places a substantial burden on the States. Moreover, the very integrity of the court system is undermined if a party may bring suit despite having slumbered on his claims "until evidence has been lost, memories have faded, and witnesses have disappeared." *R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944).

Statutes of limitations "represent a legislative judgment about the balance of equities." *United States v. Marion*, 404 U.S. 307, 323 n.14 (1971); *see also Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones"). State legislatures must balance the integrity and efficiency of the court system, as well as the rights of defendants, against the potential that a meritorious claim will be barred. The interpretation of 28 U.S.C. § 1367(d) adopted by the Maryland Court of Appeals effectively supersedes such public policy determinations. The impact of setting aside the balance struck by these state legislatures is substantial. The resolution of the issue raised by the petition is vitally important to the proper administration of the court systems of all States.

III. THE COURT BELOW ERRED IN ADOPTING A CONSTRUCTION OF 28 U.S.C. § 1367(d) THAT WOULD FORCE STATES TO ACCEPT STALE CLAIMS.

Not only does the petition present the Court with an opportunity to resolve the split among the state courts of last resort with respect to this important issue, the Court should grant certiorari to correct the erroneous decision of the Maryland Court of Appeals. The decision below is inconsistent with both the language of the statute and congressional intent.

The statute provides that when federal jurisdiction to hear an action is based solely on 28 U.S.C. § 1331 and state law claims are dismissed pursuant to 28 U.S.C. § 1367(c), the state limitations period for state law claims "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed." 28 U.S.C. § 1367(d). The statute should therefore be read as affording plaintiffs a 30-day period to re-file state law claims after the federal action is dismissed. While the federal action is pending, the state limitations period "shall be tolled" (i.e., the pendency of the federal action keeps the state limitations period from expiring). Once the federal action is dismissed, the plaintiff has "a period of 30 days" within which to re-file those state law claims. 28 U.S.C. § 1367(d).

Under the interpretation adopted by the Maryland Court of Appeals, the state law limitations period is tolled not once, but twice. Under the decision below, the filing of the federal action prevents the state limitations period from expiring, and the portion

of the limitations period that remained when the federal action was commenced is added to the 30-day period. As a result of this double counting of the tolling period, the original state limitations period can become twice as long. Take, for example, a State that has adopted a three-year limitations period for state antitrust violations. If the plaintiff files a federal court action shortly after the violation and the federal claims are dismissed after approximately three years, the plaintiff, under the decision below, would effectively have a new three year limitations period. Allowing such a claim to be brought in state court six years after the date of the violation and three years after the federal court dismissal cannot be squared with the language of the statute.

Congressional intent further confirms that the decision below is wrong. The Judicial Improvements Act of 1990, 104 Stat. 5089 (1990), was enacted to address what Congress perceived to be a growing burden on the Nation's economy as a result of high litigation costs. S. Rep. No. 101-416, at 7 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6802, 6809. This statute must be construed in light of that purpose. *See, e.g., Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984). Congress would not have responded to "[t]he burden of high litigation costs" by substantially expanding state limitations periods, thereby compounding the very problem Congress sought to remedy. S. Rep. No. 101-416, at 7 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6802, 6809.

Prior to 1990, an appropriate mechanism did not exist for the efficient transfer of pendent state claims from federal court to state court when the federal

claims were dismissed. Prior to the adoption of 28 U.S.C. § 1367(d), if the state statute of limitations expired while the action was pending in federal court, the federal court had no means of ensuring that the state law claims could be re-filed in state court without the risk that those claims would be dismissed as time barred. *See Jinks v. Richland County,* 538 U.S. 456, 462-63 (2003). In 1990, Congress amended the statute in order to "provid[e] a straightforward tolling rule" that would facilitate the transfer of remaining state law claims to state court after the federal claims are dismissed. *Id.* at 463; *see* Judicial Improvements Act of 1990, 104 Stat. 5089 (1990).

The tolling provision set out in 28 U.S.C. § 1367(d) was added "to prevent the loss of claims to statutes of limitations . . . while a supplemental claim was pending in federal court." H.R. Rep. No. 101-734, at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6860, 6876. Congress intended to provide a limited window so that state law claims could be re-filed in state court without the risk that those claims would be time barred under state law. The statutory language and its legislative history is devoid of any indication that Congress intended to significantly expand the time within which state law claims may be brought in state court. When Congress intends to dramatically alter the delicate balance between the States and the Federal Government, Congress "must make its intention to do so "'unmistakably clear in the language of the statute.'" *Raygor v. Regents Univ. of Mich.,* 534 U.S. 533, 543 (2002) (quoting *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985))). Here, no such unmistakable intent can be

found in either the statutory language or the legislative history.

28 U.S.C. § 1367(d) was patterned after a 1969 proposal of the American Law Institute ("ALI"). Ralph U. Whitten, *Commentary: Curing the Deficiencies of the Conflicts Revolution: A Proposal for National Legislation on Choice of Law, Jurisdiction, and Judgments*, 37 WILLAMETTE L. REV. 259, 283 n.79 (2001); Patrick D. Murphy, *A Federal Practitioner's Guide to Supplemental Jurisdiction under 28 U.S.C. § 1367(d)*, 78 MARQ. L. REV. 973, 1031 n.306 (1995). This ALI proposal advocated a 30-day period to re-file claims that were dismissed by a federal court for lack of subject matter jurisdiction. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 65 (1969). The commentary to the ALI proposal states:

> This subsection provides that if an action timely commenced in a federal court is dismissed for lack of [subject-matter] jurisdiction, a new action on the same claim in another court shall not be barred by any statute of limitations that would not have barred the original action had it been commenced in that court, if suit is brought in a proper court, state or federal, within thirty days or within such longer period as may be available under applicable state law.

Id. at 373-74 (emphasis added). Just as the ALI proposal set out a straightforward 30-day period, the drafters of 28 U.S.C. § 1367(d) universally understood this statute as creating a 30-day period to re-file in

state court. *See* Thomas M. Mengler, Stephen B. Burbank, Thomas D. Rowe, Jr., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 216 (1991) (noting that when claims are dismissed under 28 U.S.C. § 1367(c), such claims "are tolled for 30 days after they are dismissed, unless state law provides for a longer period"); H.R. Rep. No. 101-734, at 27 n.13 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6860, 6873 n.13 (expressing appreciation to Mengler, Burbank and Rowe for their role in the drafting of this section); *see also* David D. Siegel, *The 1990 Adoption of § 1367, Codifying "Supplemental" Jurisdiction,* 28 U.S.C.A. § 1367, at 768 (West 2006) (commentary on revision) (referring to "the 30-day tolling provision of subdivision (d)").

A 30-day period to re-file state claims is entirely consistent with Congress' intent to provide an appropriate mechanism to allow the transfer of claims from federal to state courts. The tolling provision of 28 U.S.C. § 1367(d) only applies following dismissal of a federal action – an act that occurs after the plaintiff has completed his pre-complaint investigation and has drafted and filed his complaint. Following the dismissal of the federal action, plaintiff's counsel need merely amend the caption of the complaint, repeat the state law claims set out in the federal complaint and file the action in state court. Such a ministerial task can be accomplished readily in far less than 30 days. The Maryland Court of Appeals, however, concluded that Congress intended to expand substantially the plaintiff's time period for re-filing – affording plaintiff a two year re-filing period under the facts of this case. Such a result is not consistent with Congress' desire to

create a limited window within which the state law claims can be re-commenced in state court. The decision of the Maryland Court of Appeals is in error and should be reversed.

CONCLUSION

The petition for writ of certiorari should be granted.

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